United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1048

To be argued by
AUDREY STRAUSS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1048

UNITED STATES OF AMERICA,
Appellee,

—v.—

CARL W. ANDERSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

AUDREY STRAUSS,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

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Preliminary Statement

Carl W. Anderson appeals from orders entered on January 7 and February 1, 1977 in the United States District Court for the Southern District of New York by the Honorable Whitman Knapp denying his motion for a new trial on the ground of newly discovered evidence, pursuant to Rule 33, Fed. R. Crim. P.

Indictment 74 Cr. 859, filed on September 10, 1974, charged Anderson and others in nine counts with conspiracy and substantive violations of the Federal securities laws. On April 30, 1975, following a month long trial before Judge Knapp and a jury, Anderson was convicted of the conspiracy count, Count One of the Indictment. On June 16, 1975, the District Court sentenced Anderson to a term of imprisonment of a year and a day.

On March 8, 1976, this Court affirmed Anderson's conviction in an opinion reported at 532 F.2d 249. We respectfully refer the Court to that opinion for the general background of this case, as well as of the cases of Anderson's co-defendants.*

Following the affirmance of his conviction, Anderson petitioned the United States Supreme Court for a writ of certiorari. On October 4, 1976 that petition was denied.

By motion papers dated November 3, 1976, Anderson moved for a new trial. His essential claim was that certain Government witnesses committed perjury at his trial. On January 6, 1977 Judge Knapp denied the motion. On January 11, 1977, Anderson moved to reargue and sought a stay of surrender pending appeal. On January 31, 1977 the motion to reargue was denied, as was the stay.

On February 8, 1977, Anderson moved this Court for a stay of his surrender. That motion was denied. Anderson surrendered that afternoon and is presently serving his sentence.

Statement of Facts

Judge Knapp's denial of the new trial motion was based on his determination that the newly discovered evidence could not have altered the jury's verdict in this case. To properly evaluate the District Court's finding in that regard the newly discovered evidence must be viewed in the context of the whole case against Anderson. Therefore, this statement of facts will first outline the case against Anderson and then focus on that part of the case to which the newly discovered evidence relates.

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* A further opinion relating only to Anderson's co-defendant, Donald Eucker, is reported at 537 F.2d 718 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3487 Jan. 15, 1977.

A. The Case Against Anderson

The criminal case grew out of the financial difficulties of Orvis Brothers ("Orvis"), a well-established brokerage firm. In 1969, the firm's capital position was so badly eroded that, under New York Stock Exchange rules, it should not have been operating. Hoping to keep the firm running in the face of these problems, several partners of Orvis, including Carl W. Anderson, entered into a criminal conspiracy to falsify the firm's books and records, thereby concealing its financial problems and avoiding action by either the New York Stock Exchange or the Securities and Exchange Commission. The falsified financial records kept the firm open through 1969 and half of 1970, when the firm finally collapsed leaving behind it $4,000,000 in debts.

The evidence at trial showed that Anderson, the Chairman of the Executive Committee and the second in command at Orvis, was aware from March, 1969 of the financial difficulties of his firm. His partner, Thomas Kilduff, who was in charge of financial operations, began to falsify the books to hide those difficulties, reporting back to the Executive Committee that he had done so. Anderson affirmatively joined the conspiracy the following month, when he ratified Kilduff's prior fraudulent actions and authorized Kilduff to continue his efforts, telling him to make sure that Orvis stayed in business. (Tr. 209).*

In April 1969 Orvis was due for an audit by its accountants, Haskins & Sells. The trial evidence established

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* References prefixed by "Tr." are to the trial transcript in this case and references prefixed by "GX" are to Government trial exhibits. "Br." refers to the appellant's brief on appeal; "App." refers to appellant's appendix on appeal; "Dist. Ct. App." refers to the defendant's appendix submitted with his motion papers in the District Court.

that by the time of this audit, Anderson was aware that the following falsifications were being used to bolster the appearance of capital on Orvis' books: (1) the placement of a $797,100 receivable on the books to make it appear to be current capital; (2) the use of 4,000 shares of Clinton Oil as capital without posting their cost; (3) the use of an additional 5,000 shares of Clinton Oil as capital without posting their costs; (4) the posting of four bad debt accounts, (including the Fund of Letters account) as cash accounts when they were long past their settlement dates and should have been charged against firm capital. (Tr. 267-68, 289-90, 309-10). With respect to the last item, Anderson was responsible for the Fund of Letters account, a $400,000 item and the largest of the bad debts.

Although the Executive Committee had been keeping the lid on the firm's problems, by August 20, 1969 the need for capital forced the Executive Committee to reveal the firm's desperate situation to the general partnership. At a meeting of the general partnership held on that date at the New York Athletic Club, members of the Executive Committee informed their partners of the need for capital to keep Orvis Brothers running. Two days later Anderson and his partner (and later co-defendant) Fergus Sloan, travelled to Memphis to see Rick Clinton and to try to get money from him. (Clinton had invested money in Orvis as a subordinated lender and as president of the Clinton Oil Company, also represented one of the Orvis' most important accounts). With Anderson present, Sloan told Clinton that he, Clinton, in effect owned Orvis and had to put money into the firm to keep it alive. (Tr. 193, 206-09, 2190).

Following this meeting in Memphis, Clinton was understandably concerned about his investment in Orvis and, consequently, sent two attorneys, Lynn Gamelson and Benjamin Smith, to New York to ascertain Orvis' financial condition. On August 28, 1969 Gamelson and

Smith met with Anderson at his office and, also, spoke to Anderson's partner, Sloan, by phone. Faced with their concerned inquiries, Anderson assured them that Orvis was in good shape, and attempted to demonstrate the firm's well-being by returning to Gamelson stock which he had invested in Orvis. (Tr. 1160-66, 1242-56, 2207, 2195).

In contrast to the rosy picture which Anderson painted for Smith and Gamelson, around the same time Anderson withdrew $53,075 from his personal account at Orvis. On the next day, in expectation of the auditors' arrival, Anderson reversed the transaction, leaving that money to be computed as part of the firm's capital. On September 1, 1969, the day after the audit's cut-off date, Anderson withdrew the funds from the firm. (Tr. 2641-43, 2653-54).

In September, Kilduff further falsified the books, with Anderson's knowledge. A $500,000 commission payment by Clinton was placed in the firm trading account to bolster the firm's capital position. The non-existent $797,100 debit was collateralized by the transfer of shares from Rick Clinton's subordinated loan account. (Tr. 247-48, 332-64).

In October, a financial questionnaire, Form X-17A-5, was filed with the New York Stock Exchange and the Securities and Exchange Commission in accordance with their respective rules and regulations. (GX 74). The numerous false statements contained in that questionnaire was at the heart of the Government's case. The document was signed only after a meeting in which Anderson and other partners of the firm reviewed the document with their auditors, Haskins & Sells. Anderson's knowledge of the falsity of that document was clear not only from Kilduff's testimony, but also from

Netelkos' testimony that, at a later date, Anderson told him not to waste his time on the false figures contained in the questionnaire. (Tr. 1970, 1978, 1982).

The Government's proof did not end with the filing of the false questionnaire in October, 1969. The evidence showed the firm in continued financial distress, staying alive only because the defendants continued to hide Orvis' true capital position. Nevertheless, as late as December, 1969 Anderson again assured Benjamin Smith of Orvis' financial stability. (Tr. 1260-61).

In January 1970, Chris L. Netelkos offered to invest badly needed capital in Orvis. Shortly after his arrival on the scene, Netelkos began to discover the falsifications on the books. He uncovered enormous illegal hypothecations of customer-owned securities, amounting to six million dollars of customers' securities which were supposed to be held for safe-keeping but in fact had been pledged by Orvis at banks to generate capital for the firm's use. When confronted with this discovery, Anderson told Netelkos, "If it stops, the firm goes out of business." (Tr. 1989). Anderson further warned Netelkos against informing the Orvis Executive Committee about the hypothecations. (Tr. 1982).

B. The Relevance at Trial of the 80,000 Share Trade

The claims made upon the instant motion relate entirely to an 80,000 share trade which caused one of the many falsifications of Orvis' books. The gist of the trial evidence relating to the 80,000 share trade was that in August 1969, shortly before the auditors were due to arrive, Orvis Brothers confirmed a sale of 80,000 shares of Clinton stock by Orvis to a non-existent Clinton Pension Fund. This sale improved the appearance of the Orvis' capital posiiton because it avoided a 30% "hair-

cut" taken off the value of any stock owned by the brokerage firm in computing capital.* The 80,000 share sale at $11 per share improved Orvis' capital position by $235,000 (30% of the $880,000 purchase price).

The fraud involved in this transaction was the fact that there was not a real sale of stock. Clinton had not committed himself to buy that stock and upon receiving the confirmation, Clinton Oil immediately sent a telegram to Orvis disavowing the transaction. However, in spite of the repudiation of the sale, and even though no money or shares ever changed hands, Orvis carried the transaction on its books as a completed sale giving the firm the benefit in the computation of capital. In short, although Orvis' capital position was really not improved, Orvis' books were falsely bolstered. This evidence damaged Anderson to the extent that the Government established that Anderson knew about the transaction, knew that it was not a *bona fide* sale, and knew that it was carried on the books as though it were.

The critical evidence against Anderson on this issue came not from Clinton, Gamelson or Smith; the damage was done to him by Kilduff. Kilduff testified that at the end of August, 1969, Sloan announced in Anderson's presence, that he had sold 80,000 shares of Clinton stock to Clinton. (Tr. 376-77). Kilduff further testified that a day or so later, with Anderson present, Eucker suggested that the trade be put on the books before the running of the five-day settlement period so that the sale would prop up the firm's capital position before the cut-off date for the audit, August 31st. (Tr. 378-79). This was

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* The New York Stock Exchange values shares held as firm capital at 70% of their market value to allow for market fluctuation. Thus in computing the firm's capital there is a 30% "haircut" on firm-owned shares.

done. Even though Clinton never paid for the stock, the trade remained on Orvis' books, falsely inflating capital, until June, 1970.* (Tr. 383-84). At executive committee meetings, with Anderson in attendance, Sloan was questioned about payment for the stock. (Tr. 384).

It was this evidence, from Kilduff, which demonstrated that this 80,000 share trade constituted one of the many falsifications of Orvis' books of which Anderson was aware. The other pertinent trial testimony essentially established that the sale of the 80,000 shares was confirmed to Clinton, at Sloan's direction, although Clinton did not believe a firm commitment to purchase the stock had existed. To this effect, Clinton testified that when he met Sloan and Anderson in Memphis, Sloan raised the possibility of a sale of the 80,000 shares by Orvis to a Clinton Pension Fund. Clinton said that he told Sloan that there was no such pension fund and that he would have to discuss the matter with his lawyer, although he conceded on cross-examination that Sloan may have concluded that there was a deal to sell the stock. (Tr. 2238). Clinton also testified about his effort to disclaim the sale after he received the confirmation from Orvis.

Anderson's version of these events was essentially in accord with Clinton's, as defense counsel emphasized in summation. Anderson testified that he recalled hearing Sloan and Clinton discuss a sale of 80,000 shares to a pension fund for $11 a share. (Tr. 2543). Clinton said he would have to check with his attorneys. (Tr. 2544).

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* Although Kilduff testified on cross-examination that until May, 1970 he thought this was a "good trade," it was apparent from the direct examination that he and Anderson knew that the stock was not paid for and his statement on cross-examination meant only that he thought that Clinton had, in fact, placed an order to buy the stock.

However, on cross-examination Anderson said that he did not recall that Clinton said that there was no Clinton Pension Fund, (Tr. 2690), and he believed that the sale was a "good trade" because he saw Sloan and Clinton shake hands on it, saying "It's a deal." (Tr. 2692).

Smith and Gamelson each testified that after the Memphis meeting they went to Orvis at Rick Clinton's behest to look into Orvis' financial situation and its inventory of Clinton stock. They each gave an extremely brief synopsis of the resulting discussions with Anderson, whom they met in person and with Sloan, to whom they spoke by phone, on that occasion. The heart of the testimony was that Anderson and Sloan assured them that Orvis was in good financial condition at that time. In passing, each testified that the 80,000 share trade was not discussed during the meeting. (Tr. 1220, 1258-59).

Anderson's testimony in his own behalf did not even touch on his meeting with Smith and Gamelson. As to the subsequent history of this transaction, Anderson testified that in mid-September he learned of Clinton's telegram disclaiming the sale. (Tr. 2546). He discussed the matter with Sloan, who assured him that it was only a little problem that he, Sloan, had to work out with Clinton. (Tr. 2561). Several days later, Sloan told him that the auditors confirmed the trade, and Anderson thereafter considered it a completed matter. (Tr. 2562).

In summation, defense counsel argued that even on Clinton's testimony, which was in agreement with Anderson's with respect to this issue, Anderson fairly concluded from the Memphis meeting that this was a "good trade." * (Tr. 2888-80). Defense counsel further argued

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* Defense counsel never explained in what sense Anderson thought it was a "good trade." Anderson did not at any time claim that he thought that the stock had been paid for.

that after Sloan's later assurances, Anderson continued to think that it was a "good trade," (Tr. 2888-90), and since Kilduff thought likewise, there was no conspiracy to put it on the books as a "phony trade." (Tr. 2894-95). Defense counsel also contended that Clinton was willing to make the trade to protect his own investment in Orvis. (Tr. 2896). In an otherwise lengthy defense summation, Gamelson's and Smith's trip to Orvis was mentioned only briefly and then merely to suggest that the true purpose of their visit was to determine if Orvis was damaging the price of Clinton Oil stock by dumping it on the market. (Tr. 2910-11).

The Government's summation referred to the 80,000 share transaction as one of the six ways that Orvis was propping up its capital. (Tr. 2953). This particular transaction was labelled as "Sloan's baby" (Tr. 2953), although in later discussing Anderson's knowledge and participation, the prosecutor referred to Anderson's lack of candor with Smith and Gamelson with regard to Orvis' true financial condition and the agreement for the 80,000 share trade. (Tr. 2974). However, the Government's argument about Smith and Gamelson's visit to New York focused on Anderson's effort to mislead them into believing that Orvis was in no financial trouble at that time. (Tr. 2967, 1970, 2974, 3001).

The charge of the Court to the jury dealt with the 80,000 share trade as follows:

> "Second, you have heard all about the $80,000 trade in Clinton stock. The Government contends that to the certain knowledge of at least some of the conspirators, including specifically the defendant Anderson, such trade never existed and gave rise to no valid receivable.
>
> "To the extent you believe this claim to have been substantiated, you may conclude that the receiv-

> ables reflected by this alleged trade falsely inflated the balance in the customer's cash account. Obviously it is for you to say whether the claim was substantiated." (Tr. 3039).

The charge, we submit, correctly focused on the central point of this evidence in the case—proof of Anderson's knowledge that the actual trade was not made and was thus improperly placed on the books, as Kilduff testified.

In sum, the 80,000 share trade, which was a fraction of the case against Anderson, was only important to show his knowledge of the false entry it created in Orvis' books. The visit with Smith and Gamelson was important to show Anderson's effort to mislead them by painting a rosy picture of Orvis' finances.* It is against this framework of the trial evidence with respect to the 80,000 share transaction and the Smith-Gamelson visitation that the newly discovered evidence properly must be considered.

C. The Newly Discovered Evidence

In support of the motion for a new trial, defense counsel presented three documents and portions of civil depositions which are claimed to constitute newly discovered evidence requiring another trial of this case. The gist of the new evidence is that Gamelson and Smith discussed the 80,000 share trade with Anderson at their meeting on August 28, 1969. Counsel also uses the new materials to contend that they prove that Clinton had

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* We assume that Anderson did not contradict in his own testimony Smith's and Gamelson's account of that meeting because it was consistent with his claim that he was ignorant of Orvis' financial plight.

committed himself to buy the 80,000 shares. The documents constituting the new evidence are as follows:

(1) *The rough draft of Gamelson's and Smith's memorandum of their meeting with Anderson on August 28, 1969.* In connection with Gamelson's and Smith's testimony about their meeting on August 28th with Anderson, the Government offered a memorandum of the meeting prepared shortly after the event. (GX 113). Anderson's primary piece of newly discovered evidence is a rough draft of that memorandum. The draft is replete with unreadable short-hand notations made by a secretary, Betty Fornshell, who had the draft prepared from telephonically dictated short-hand notes made as a result of a telephone call from Gamelson and Smith while they were at Orvis on August 28th. The rough draft recites that either Sloan or Anderson informed Gamelson and Smith that they understood that Clinton would be willing to help Orvis by buying 70,000 shares of Clinton Oil Company stock from Orvis' inventory. (App. 22). The second draft of the memorandum did not include this statement. (GX 113).

The rough draft confirms the essential import of the second draft, (GX 113), namely, that Anderson and Sloan (falsely) assured Gamelson and Smith that Orvis' capital situation was well within New York Stock Exchange requirements. According to the draft memorandum, the defendants explained away their tense discussion with Clinton by claiming that "a few days ago they were afraid their debt might be greater than . . . allowable but now the ratio looked like it would fall well within limits." Indeed, Gamelson and Smith were left with the impression that in light of the improved outlook, "they [Anderson and Sloan] are making no stock request for help." (App. 19).

(2) *The handwritten note signed by Clinton stating no firm commitment was made to buy the 80,000 shares.* This note was generated after Orvis sent a confirmation slip confirming the sale of 80,000 shares of Clinton Oil stock by Orvis to the Clinton Pension Fund, to which Clinton responded by immediately shooting back a telegram disavowing the trade. Clinton's handwritten note states: "Reference your confirmation notice concerning notice concerning 80,000 shares of Clinton Cil Co. stock. I made no firm commitment to buy this stock so please cancel this confirmation." (App. 24). Defense counsel argued that this note shows that in disclaiming a "firm" commitment, Clinton admitted to some commitment to buy the 80,000 shares. In fact, the note is totally consistent with Clinton's trial testimony, in which he conceded that Sloan may have concluded from their discussion in Memphis that he had agreed to buy the stock. (Tr. 2238). This memorandum, which contains a handwritten note by Gamelson stating that he had discussed this deal with Anderson and Sloan, is also used to bolster the accusation that Gamelson lied when he stated that he did not discuss the 80,000 share trade at the August 28th meeting.

(3) *The September 4, 1969 memorandum from Gamelson to Clinton relating Gamelson's telephone conversations with Sloan's assistant and with Sloan about 80,000 share trade.* (App. 26-27). This memorandum memorializes two telephone calls resulting from Clinton's effort to disavow the 80,000 share trade. First, it records a conversation between Gamelson and Sloan's assistant, Miss Richter, who called Gamelson after receiving the telegram disclaiming the trade. According to the memo, Miss Richter questioned the telegram, saying that Sloan thought that he had a firm deal with Clinton. Gamelson responded by telling Miss Richter that nothing was said about a firm deal when he and Smith met with Anderson

at Orvis' offices a few days before, nor was anything said about a confirmation being sent out. Miss Richter defended against this by saying, " 'It may be that Bill Anderson did not know anything about it.' " Defense counsel liberally utilizes that surmise by Miss Richter to argue that his new evidence proves Anderson lacked guilty knowledge about this entire transaction. (Br. 32).

The second part of the memo reveals Gamelson's discussion with Sloan later that day. Sloan explicitly described the illegal purpose of the 80,000 share trade, telling Gamelson that it was intended as a "parking operation" where the stock would not really be sold to Clinton, but would be carried on the books as though it were sold in order to improve Orvis' "financial picture." Sloan assured Gamelson that the stock would be confirmed back to Orvis within the month. Gamelson agreed to convey the message to Clinton. Defense counsel uses this part of the memo to argue that Clinton entered into a criminal conspiracy with Sloan to illegally "park" the 80,000 shares. Borrowing on the totally unrelated surmise by Miss Richter, he also argues that Anderson "did not know anything about it."

In addition to these documents, portions of depositions of Gamelson and Smith were used by defense counsel to argue that they had discussed the 80,000 share trade with Anderson in his office on August 28th. Gamelson attested that he discussed with Anderson a sale of Clinton stock during their meeting on August 28th. (Dist. Ct. App. T. 188). He recalled the reference to be brief and he did not recall mention of a specific figure like 80,000 shares or $880,000. (Dist. Ct. App. T. 188-89, 192). Defense counsel argues that this shows that Gamelson committed perjury when he testified, in passing, at Anderson's trial that he never spoke to Carl Anderson about the 80,000 share transaction. (Tr. 1220, 1223).

Smith's trial and deposition testimony on the subject remain consistent—namely, that he did not discuss the transaction with Anderson or Sloan at Orvis that day. (Tr. 1258-59; Dist. Ct. App. U). Defense counsel levels a charge of perjury against Smith by arguing that the rough draft of the memorandum of the August 28th meeting contradicts Smith's testimony that the 80,000 share trade was not discussed.*

ARGUMENT

The Newly Discovered Evidence Could Not Raise a Reasonable Doubt as to Anderson's Guilt and, Accordingly, the Motion for a New Trial Was Correctly Denied.

In a shrill brief that attempts to rehash numerous jury arguments and legal claims previously litigated in this case, Anderson pictures himself as the victim of "one of the most blatant cases of mass perjury by government witnesses in this Court's history." (Br. 43). This claim, made at the conclusion of defendant's brief, is constructed by exaggerating and distorting the record in this case beyond recognition. In fact, Anderson has not proved deliberate perjury; he has not proved suppression of evidence; and, he has not brought forth exculpatory

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* In passing, defense counsel mentions "newly discovered evidence" that Anderson was not present at the auditors' review of the financial questionnaire in October, 1969. (Br. 14). This point, raised below, is presumably abandoned on appeal by the failure to present it as part of the question presented on appeal. (Br. 9). The tactic of quickly dropping the allusion without further explanation is understandable in light of Judge Knapp's opinion on the point, which observed that the material presented did "no more than reflect the recollection of a Haskins & Sells partner who testified to the same effect at the trial." (App. 13).

evidence. Indeed, as will be demonstrated, the "new evidence" which forms the basis of his new trial motion hurts him more than it helps him.

A. The Legal Standard

This Court has frequently stated that motions for a new trial are "not favored and should be granted only with great caution." *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975); *United States* v. *Sposato*, 446 F.2d 779, 781 (2d Cir. 1971). The motion is addressed to the discretion of the trial judge, *United States* v. *Trudo*, 449 F.2d 649, 653 (2d Cir. 1971); *United States* v. *Sposato*, *supra*, and reversal is warranted only upon an abuse of discretion, *United States* v. *On Lee*, 201 F.2d 722, 723-24 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953).

Here, where there is no claim of Government knowledge of the alleged perjury or suppressed evidence, under *United States* v. *Agurs*, — U.S. —, 96 S. Ct. 2392, 49 L. Ed. 342 (June 24, 1976), the new trial motion would be properly denied upon the District Court's determination that the newly discovered evidence failed to create a reasonable doubt as to the defendant's guilt. Prior to the Supreme Court's decision in *United States* v. *Agurs*, *supra*, this Court has assessed such a motion to determine whether "the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly discovered evidence. . . ." *United States* v. *Stofsky*, *supra*, 527 F.2d at 246. This Court has not yet determined how far the decision in *United States* v. *Agurs*, *supra*, extends and the impact it has on the prior law in this Circuit. *Brach* v. *United States*, 542 F.2d 4, 6 (2d Cir. 1976). *See also*, *United States* v. *Magnano*, 543 F.2d 431 (2d Cir. 1976). However, the

Government contended in the District Court, and urges again here, that the standard announced in *United States* v. *Agurs*, *supra*, creates a test different from that previously utilized in this Circuit and permits, in a case such as this one, denial of a new trial motion upon the District Court's determination that in the face of the new evidence it remained convinced that the defendant was guilty*

As will be fully demonstrated, Anderson presented nothing which even began to raise a reasonable doubt as to his guilt in the mind of the district judge. Indeed, Judge Knapp's assessment of the newly discovered evidence was that it could not "possibly have produced a different jury verdict," (App. 15), satisfying even the more stringent test of *United States* v. *Stofsky*, *supra*. The ruling was entirely sound.**

B. The Impact of the Newly Discovered Evidence

It can be readily seen that Judge Knapp did not abuse his discretion in denying the motion, which was essentially frivolous. In this Court, defense counsel attempts to create an aura of enormous improprieties infecting most of the Government's case. In fact, his intemperate accusations are unsupported by the record

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* The standard announced in *Agurs* does not apply where the Government deliberately fostered perjury. 96 S. Ct. at 2397. Here, there is no claim that the Government had knowledge of the alleged perjury, or even permitted it by an act of negligence.

** Judge Knapp's denial of a hearing was, likewise, proper since the motion could be easily resolved upon the papers submitted. *United States* v. *Magnano*, *supra*; *United States* v. *Franzese*, 525 F.2d 27 (2d Cir. 1975); *United States* v. *Persico*, 339 F. Supp. 1077 (E.D.N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 956 (1973).

which he created in the District Court and he has utterly failed to present anything which begins to raise a reasonable doubt as to Anderson's guilt.

1. Claims Unsupported By The Record

To see this most clearly, it is helpful to separate the claims which are supported in the record from those which are not. Thus, contrary to the bald assertions in his brief,

(1) Anderson has not raised a claim that affects three-fourths of the Government's case. (Br. 15, 33). The newly discovered evidence relates only to the 80,000 share trade and does not affect in any way the proof relating to any other transactions in the case.*

(2) Anderson's newly discovered evidence does not relate to the "largest transaction" in the case. (Br. 9, 18). Although the value of the sale was $880,000, it falsely inflated Orvis' capital by only $235,000 representing the 30% "haircut." The $797,100 receivable posted as current capital constituted a larger false entry, as did the $400,000 Fund of Letters account, for which Anderson was personally responsible.

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* Consistent with his effort to make the newly discovered evidence appear grander than it really is, defense counsel contends that the Government used the "perjurious testimony" . . . "to secure this Court's affirmance by mentioning it *four* times in its appellate brief . . . ." (Br. 3) (emphasis in original). This claim is made without explaining what specifically was mentioned and by giving only two page citations for the four references of which defense counsel complains. Only the first of those citations relates to the newly discovered evidence. Moreover, in marshalling the evidence against Anderson for the purpose of demonstrating sufficiency, the Government's brief on appeal never mentioned the 80,000 share transaction, nor did this Court refer to it in finding the evidence against Anderson to be sufficient, 532 F.2d at 254-55.

(3) Anderson has not proved that Clinton committed perjury about anything whatsoever. Clinton is quickly tossed in the pile with Gamelson and Smith, (Br. 3, 11, 18, 22, 32, 33, 44), however, a careful reading of Anderson's brief and the entire record reveals that there is not even arguable proof that Clinton's trial testimony was false in any respect. Anderson labels as perjurious Clinton's testimony "that he told Anderson in Memphis on August 22, 1969 that there was no Clinton Pension Fund and no trade for 80,000 shares of Clinton Oil Company stock." (Br. 7). This mischaracterizes Clinton's testimony at trial, where he conceded that Sloan may have concluded that there was a deal to sell the stock. However, in any event, Anderson produced no new evidence showing Clinton's testimony on these points to be perjurious. The new evidence does not show, as defense counsel suggests, that the 80,000 share trade was undertaken "at Rick Clinton's suggestion." (Br. 23). The draft memorandum of the August 28th meeting, (App. 22), merely shows that Sloan or Anderson told Gamelson or Smith that Rick Clinton suggested the trade to help them. Whether Sloan or Anderson correctly represented their discussion with Clinton on the subject is a matter of speculation. In any event Sloan or Anderson's statement to Gamelson and Smith, as memoralized in the draft, is hardly admissible evidence on the issue.

(4) Anderson has not proved that there was a firm commitment by Clinton to buy the 80,000 shares, making this, as defense counsel loosely characterizes it, a *bona fide* sale. (Br. 12). Not only does the newly discovered evidence fail to establish any firm commitment to buy the stock, one of the new documents reveals Sloan's explicit purpose to "park" the stock with Clinton who attempted, through Gamelson, to disclaim any responsibility to pay for the stock. (App. 26, 27).

(5) Anderson has not proved himself ignorant of the illegal "parking operation" which Sloan undertook. (Br. 32). In one of the new documents Sloan's secretary, Miss Richter, speculated that the mailing of the confirmation may not have been mentioned to Gamelson and Smith on August 28th because perhaps Anderson did not know about it. That surmise by Miss Richter is the closest that Anderson has come to proving his ignorance of the illegal parking operation and defense counsel's use of Miss Richter's hearsay surmise as "proof" that Anderson lacked knowledge of anything can only be described as an enormous exaggeration of the record.

(6) Anderson has not proved that Clinton, Gamelson and/or Smith concocted any spurious documents, nor has he produced any evidence that they suppressed any documents. (Br. 4, 6, 9, 12, 13, 22, 24, 28, 33, 43, 44). The liberal sprinkling of these accusations through Anderson's brief falsely conjures up a picture of the witnesses fabricating a phony document to support some perjurious story. In fact, the record in this case is undisputed that Betty Fornshell took dictation from Gamelson and Smith telephonically, producing the rough draft of the August 28th meeting at Orvis. (App. 21). In the ordinary course of business and only a few days after the rough draft was prepared, the second draft was typed, incorporating insertions and deletions made by Gamelson. (Br. 5). He did so at the time of the events in issue and long before civil or criminal liabilities could be a matter of concern. There was no evidence to suggest that it was anything other than the ordinary course of business to revise a telephonically dictated draft of a memorandum before conveying it to its recipient.

Similarly, there is not one scrap of evidence that any document was "suppressed" by anyone. Defense counsel never proved that anyone deliberately failed to produce anything to the SEC. The very existence of the documents at a later date proved that no one undertook to destroy these materials.

2. Claims Supported By The Record

Putting aside the chaff, what has Anderson established upon this motion? Anderson's newly discovered evidence supports a claim that Gamelson and Smith incorrectly testified at trial that they did not discuss the 80,000 share transaction with him on August 28th. He has not proved that their testimony on this point constituted deliberate perjury. He has repeatedly failed to explain how it could be worth their while to commit perjury by denying a mere discussion of the 80,000 share transaction when having such a discussion could not possibly have subjected them to either civil or criminal liabilities. He has also failed to show that a passing reference to the 80,000 share sale in the course of the entire discussion on August 28th would necessarily be recalled by witnesses testifying about the event several years later. However, even assuming *arguendo* that Smith and Gamelson perjuriously denied that they discussed the 80,000 share sale with Anderson on August 28th, this evidence does not exculpate Anderson.

Defense counsel has not shown that Anderson is shown to be less guilty by the alleged fact that he discussed the 80,000 share sale with Smith and Gamelson on August 28th. Rather than helping Anderson, Gamelson's recent deposition as it relates to this matter hurts Anderson's cause. At the deposition Gamelson recalled that Anderson was offering assurances that Orvis was in good shape saying, "Well, there really isn't a problem. While in Tennessee, we have made some suggestion and said something to Rick [Clinton], maybe we could sell some stock to the company." (Aff. T. 188). This testimony not only contradicts Anderson's claim that it was Clinton's suggestion to buy the stock, but it contains an admission by Anderson of his involvement in this transaction that goes far beyond the picture he painted of himself at trial as a silent bystander at the Memphis

meeting during the discussion of this deal. Furthermore, the deposition testimony by Gamelson ascribes statements to Anderson which belie Anderson's claim at trial that he believed a firm deal was made in Memphis to sell the stock. The discussion to the effect that "maybe we could sell some stock to the company" hardly justified putting the trade on the books as a settled sale.*

Moreover, the September 4, 1969 memorandum presented on this motion (App. X), is, we submit, newly discovered evidence for the Government. It confirms Gamelson's surprise at receiving the confirmation for the 80,000 share trade and it makes explicit Sloan's illegal purpose of "parking" the stock to improve the appearance of Orvis' capital position. Defense counsel attempts to turn the memorandum to his advantage by arguing that it shows Smith, Gamelson and Clinton were co-conspirators with Sloan. However, the memorandum shows no such complicity, since it does not demonstrate that either Gamelson or Clinton agreed to go along with Sloan's proposal that the stock be "parked" with them. Moreover, if Sloan reached such an illegal arrangement with Gamelson, he did so on August 28th while Gamelson spoke with Sloan on the phone from Anderson's office. The Government could easily use this fact to argue that Anderson was privy to at least Gamelson's half of that conversation and if Gamelson agreed to the illegal "parking" arrangement while he was in Anderson's office, Anderson was probably not left in the dark about the matter.

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* Indeed all of the "newly discovered evidence" supports Clinton's essential claim that he never entered into a "firm commitment" to buy the stock and Orvis was not justified in confirming the sale to him when it did. Of course the crucial, undisputed fact is that Orvis had no right to carry the sale on its books as though it were paid for when in fact it never was.

In sum, Anderson's new evidence, which only relates to a fractional portion of the Government's case, inculpates, rather than exculpates him and thus could not have altered the verdict in his favor. As to the use of alleged perjury by Gamelson and Smith to impeach their credibility, this also could not have affected the verdict in this case. Gamelson and Smith cannot be characterized as the Government's main witnesses, a fact noted by Judge Knapp who presided at the trial. (App. 13). Moreover, it is hard to believe that the jury would have been greatly impressed if their testimony that they did not discussed the 80,000 share trade with Anderson had been challenged by a prior inconsistent statement to the contrary. The jury could have fairly concluded that the point was not significant enough to damage their credibility at all. However, assuming that their credibility had been undercut, the heart of the Government's case, presented through Kilduff's testimony of the many falsifications made with Anderson's knowledge and approval, would have remained undamaged.*

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* Along with many other inaccurate claims, the claim is made in appellant's brief that the "perjurious testimony" of Clinton, Gamelson and Smith was used "to cross-examine Anderson on the substantive issue and to impeach his credibility." (Br. 3). In fact the only arguable perjury—Gamelson's and Smith's denial of a conversation with Anderson about the 80,000 shares on August 28th—was never raised in either the direct or cross-examination of Anderson. The passages of cross-examination quoted by Anderson (Br. 28) relate entirely to the Memphis meeting with Clinton.

Anderson also argues at length that he and others believed the 80,000 share transaction was a *"bona fide"* sale. The newly discovered evidence lends no additional support to this specious argument that attempts to confuse Clinton's commitment to buy the stock with Orvis' taking the 30% haircut even though the sale was not consummated. In any event, defense counsel's argument which was aired fully before the jury, has no place here.

CONCLUSION

The orders of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

AUDREY STRAUSS,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18 day of March, 1977 he served a copy of the within by placing the same in a properly postpaid franked envelope addressed:

Carro, Spanbock, Londin, Rodman & Pass
1345 Avenue of the Americas
New York N. Y. 10019

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

18 day of March 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977